

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JOSEPH GEORGE,

Plaintiff,

v.

W. SULLIVAN, et al.,

Defendants.

Case No. 1:20-cv-00659-SKO (PC)

**FINDINGS AND RECOMMENDATIONS
TO DENY PLAINTIFF'S MOTION TO
PROCEED *IN FORMA PAUPERIS* AND
DISMISS ACTION**

(Doc. 2)

14-DAY DEADLINE

Clerk of the Court to Assign a District Judge

Plaintiff Joseph George, a state prisoner proceeding *pro se*, initiated this civil rights action on May 11, 2020. (Doc. 1.) Before the Court is Plaintiff's application to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915. (Doc. 2.) Because Plaintiff has three "strikes" under section 1915(g) and fails to show that he is in imminent danger of serious physical injury, the Court recommends that his application be denied and this action dismissed without prejudice.

I. THREE-STRIKES PROVISION OF 28 U.S.C. § 1915

28 U.S.C. § 1915 governs *in forma pauperis* proceedings. The statute provides, "[i]n no event shall a prisoner bring a civil action ... under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger

of serious physical injury.” 28 U.S.C. § 1915(g).

II. DISCUSSION

The Court takes judicial notice of four of Plaintiff’s prior actions or appeals that were dismissed because they were frivolous or failed to state a claim on which relief can be granted¹: (1) *George v. Schultz, et al.*, No. 4:05-cv-01070-CW (N.D. Cal.) (dismissed on November 9, 2005, for failure to state a claim²); (2) *George v. Doe*, No. 4:07-cv-03697-CW (N.D. Cal) (dismissed on August 1, 2007, as duplicative and abusive under 28 U.S.C. § 1915A); (3) *George v. United States, et al.*, No. 3:19-cv-01544-AJB-BLM (S.D. Cal) (dismissed on October 7, 2019, as frivolous); and, (4) *Joseph George v. USA*, No. 19-56528 (9th Cir.) (dismissed on February 6, 2020, as frivolous). All of these cases were dismissed before Plaintiff initiated the current action on May 11, 2020. Plaintiff is therefore precluded from proceeding *in forma pauperis* in this action unless, at the time he filed his complaint, he was under imminent danger of serious physical injury. *See Andrews v. Cervantes*, 493 F.3d 1047, 1052-53 (9th Cir. 2007).

Plaintiff’s claims stem from incidents that occurred at California Correctional Institution (CCI) in Tehachapi, California. (*See* Doc. 1 at 1-2.) Plaintiff is no longer incarcerated at CCI; he is currently incarcerated at Pelican Bay State Prison. (*See id.* at 1.) Plaintiff, therefore, does not show that he is in imminent danger of physical injury.

III. CONCLUSION AND RECOMMENDATIONS

Based on the foregoing, the Court RECOMMENDS that:

1. Plaintiff’s motion to proceed *in forma pauperis* (Doc. 2) be DENIED; and,
2. This action be DISMISSED without prejudice to refile upon prepayment of the filing fee.

The Clerk of the Court is DIRECTED to assign a District Judge to this action.

These Findings and Recommendations will be submitted to the United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). **Within 14 days**

¹ The Court may take judicial notice of court records. *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980).

² The court dismissed one of Plaintiff’s claims for failure to exhaust administrative remedies prior to filing suit. *George v. Schultz, et al.*, Case No. 4:05-cv-01070-CW (N.D. Cal.) (Doc. 12 at 4). Because the failure to exhaust was clear on the face of the complaint (*see id.*), the dismissal counts as a strike for failure to state a claim. *See El-Shaddai v. Zamora*, 833 F.3d 1036, 1043-44 (9th Cir. 2016).

1 of the date of service of these Findings and Recommendations, Plaintiff may file written
2 objections with the Court. The document should be captioned, "Objections to Magistrate Judge's
3 Findings and Recommendations." Plaintiff's failure to file objections within the specified time
4 may result in waiver of his rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir.
5 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

6
7 IT IS SO ORDERED.

8 Dated: May 14, 2020

/s/ Sheila K. Olerto
UNITED STATES MAGISTRATE JUDGE